IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHANN BREYER, Plaintiff,	:	
v.	:	CIVIL ACTION
DORIS MEISSNER, United States Immigrantion and Naturalization Service, Defendant.	:	NO. 97-6515

Memorandum and Order

YOHN, J. November ___, 2001

Presently before the court is plaintiff Johann Breyer's motion for summary judgment. For the reasons that follow, the motion will be denied.

I Background

Johann Breyer was born on May 30, 1925 in Nova Lesna, a village in what was then Czechoslovakia. His father was German, and his mother was born in Manayunk, Pennsylvania (although his mother's birthplace may still be disputed by the government). On February 10, 1943, at the age of 17, Breyer was inducted into the Waffen SS branch of the German armed forces, and was assigned to the SS *Totenkopf* ("Death's Head") Battalion, a military subdivision of the Waffen SS. He attended four weeks of basic infantry training, and at the close of this period he was required to attend a ceremony at which an oath of allegiance to Adolf Hitler was read to the inductees. As a member of the Death's Head Battalion Breyer bore responsibility for guarding the perimeter of the concentration camp at Buchenwald, Germany,

and later served the same role at Auschwitz, Poland.[1]

Breyer's absence from home created a financial hardship for his family, and he asserts that two separate requests for his discharge were made on his behalf so that he could help his sick parents with the upkeep of their farm. These efforts were unavailing, and although he was twice granted temporary "leaves" from his service at Auschwitz, each time he returned to his post. Breyer ultimately was captured by Russian forces, and when World War II ended, he was a Russian prisoner of war. After being released by the Russians, Breyer traveled to Germany where he located his parents in 1946. In 1952, at age 26, he came to the United States under the Displaced Persons Act of 1948, and was naturalized in 1957. He has lived an ostensibly peaceful life here since that time.

In 1991 the Office of Special Investigations ("OSI") of the United States Immigration and Naturalization Service ("INS") summoned Breyer, and questioned him regarding his service during World War II. He disclosed his Nazi affiliations, and since that time the INS has actively pursued Breyer's removal from the United States through extensive litigation. In his complaint in this action Breyer seeks a declaration of his citizenship, contending that because his mother was born in the United States, he is a citizen by birth. The Third Circuit reviewed a dismissal of Breyer's claim pursuant to Fed. R. Civ. P. 12(b)(6), and in so doing, assumed that the allegations in his complaint–including those concerning his mother's

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[1] I note that the INS contends that Breyer also undertook a separate oath of loyalty to the Third Reich upon being assigned to Auschwitz. *See* Government's Response to Plaintiff's Motion for Summary Judgment ¶ 6. This is a question of fact that is not properly resolved by the court at this time. However, because this is Breyer's motion for summary judgment, and the facts must be stated in the light most favorable to the INS, *see infra* at 3-4, I will assume that Breyer did in fact take a separate oath of allegiance subsequent to his eighteenth birthday.

birthplace–to be true. *See Breyer v. Meissner*, 214 F.3d 416, 421 (3d Cir. 2000). The INS contended that, even assuming that Breyer's mother was American, the statutory scheme in place at the time of his birth rendered him a non-citizen because although the children of citizen fathers and alien mothers were considered citizens under the law at that time, the progeny of citizen mothers and alien fathers were not. *See id.* at 427. The court of appeals found that this statutory scheme was inconsistent with the constitutional guaranty of equal protection of the laws, and accordingly concluded–again assuming his allegations to be true–that he was a birthright citizen of the United States. *Id.* at 429. The court, however, indicated the possibility that even if Breyer was a citizen at birth, through his actions during World War II he may voluntarily have relinquished his American nationality. *Id.* at 431. It remanded the case for further factfinding regarding whether Breyer voluntarily expatriated himself from the United States by serving in the Death's Head Battalion, and in undertaking the commensurate pledges of loyalty to the Third Reich.

Breyer has moved for summary judgment declaring him a birthright citizen of the United States and directing the INS to issue a certificate of the same. He asserts that there is no genuine question that his service in the Death's Head Battalion was involuntary. The INS vigorously contests this assertion and opposes the motion.

II Legal Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court is not to resolve disputed factual issues, but

rather should determine whether there are genuine, material factual issues that require a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In order to determine whether summary judgment is appropriate in this particular case, all of the facts delineated above are stated in the light most favorable to the defendant as the non-moving party. *See Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001).

III Discussion

Breyer makes three primary arguments as to why he never voluntarily renounced his citizenship. First, he contends that his oath of loyalty to the Third Reich and the portion of his service that transpired prior to his eighteenth birthday must be deemed involuntary as a matter of law. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment ("Pl.'s Memorandum") at 5. Breyer posits that the Nationality Act of 1940 ("1940 Act"), which was the law governing expatriating acts at the time of his service in the Death's Head Battalion, is the standard under which these actions must be evaluated. *Id.* Under that Act, he asserts, the affirmation of loyalty and rendering of military service to a foreign power were not expatriating when performed by an individual who had yet to reach the age of majority. *Id.* (citing The Nationality Act of 1940 §§ 401(b), 401(c) and 403(b), 54 Stat. 1168-70). The INS contends that the 1940 Act does not control this court's evaluation of the expatriating effect of Breyer's actions, but rather that the Immigration and Nationality Act of 1952 ("INA"), Pub. L. No. 82-414, 66 Stat. 163, as amended, 8 U.S.C. § 1481, should guide the court's consideration.

Following its enactment in 1940, the Nationality Act remained intact for over a decade, when it was modified in 1952 by the INA. The INA has itself been amended several times over the ensuing half-century, and as currently codified (in pertinent part) at 8 U.S.C. §

1481, it differs from its predecessor in a way that is especially significant from the perspective of the instant litigation.[2] The INA does not establish as a precondition to expatriation the attainment of the age of majority by an individual who has entered or served in the armed forces of a foreign state "engaged in hostilities against the United States."[3] 8 U.S.C. § 1481(a)(3)(A); *cf.* Nationality Act of 1940 § 403(b) (requiring that such an individual be at least eighteen years of age, but not requiring the foreign state to be engaged in hostilities against the United States).[4] Thus the question of governing law is of real consequence; if the INA controls the evaluation of Breyer's actions, his pre-majority service may be grounds for a finding of voluntary expatriation, but not so if the 1940 Act governs.[5]

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[2] There is at least one additional noteworthy distinction between the 1940 Act and the INA. Unlike its historical antecedent, § 1481 codifies a presumption that an expatriating act was undertaken voluntarily. *See* 8 U.S.C. § 1481(b). However, as explained more fully below and despite Breyer's arguments to the contrary, this presumption will apply in the instant matter regardless of which statute determines the expatriating effect of Breyer's actions.

[3] The current version of the INA includes a provision under which an individual who served in a foreign military while under the age of eighteen can within six months of his eighteenth birthday assert his claim to United States nationality, and thereby obviate the expatriating effect of that service. 8 U.S.C. § 1483(b). This, however, Breyer did not do, and thus under 8 U.S.C. § 1481(a)(3) his service as a seventeen year old would be expatriating if undertaken voluntarily and with an intent to relinquish his claim to United States citizenship.

[4] This presumption first appeared in the statute as a product of the 1961 amendments thereto. *See Vance v. Terrazas*, 444 U.S. 252, 269 (1980) (describing the 1961 amendment to the INA as a response to the allocation of the burden of proof to the government in *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958), and as evincing a congressional preference that the burden of proving the involuntariness of an expatriating act lies with the party asserting involuntariness).

[5] This is not to say that the determination of the applicable law will be dispositive of the issue of the voluntariness of Breyer's actions. Even if the 1940 Act does apply, and his actions as a minor are considered non-expatriating as a matter of law, much of Breyer's service to the Third Reich occurred after his eighteenth birthday.

Before resolving this question, however, it is worth noting what is not in debate; like its predecessor, the INA establishes that "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state" (as opposed to entering or serving in a foreign armed service) is an expatriating act only where such allegiance is proclaimed by an individual who has "obtained the age of eighteen years." 8 U.S.C. § 1481(a)(2); *see also* Nationality Act of 1940, ch. 876, § 403(b), 54 Stat. 1137, 1170. It is thus clear–and the INS does not contest this point–that under either version of the law of expatriation, the fact that Breyer swore an oath of allegiance to Adolf Hitler and the Nazi regime upon his induction into the Death's Head Battalion is not a basis upon which he can be said to have relinquished his United States citizenship. *See id.* This legal tenet is divorced from any discussion of whether he did so voluntarily. Indeed, regardless of whether Breyer's oath was coerced, he cannot, as a matter of law, have alienated his citizenship by taking an oath to a foreign power as a seventeen year old. *See Perri v. Dulles*, 206 F.2d 586, 588-89 (3d Cir. 1953) ("It has long been settled both by administrative practice and judicial decision . . . that a citizen by birth who has not yet attained his majority cannot expatriate himself by taking an oath of allegiance to a foreign state. Expatriation must be by voluntary act, and the act of a minor is not regarded as voluntary in this sense.") (citations omitted).

The question of which law determines the expatriating effect of Breyer's pre-majority service in the Death's Head Battalion, by contrast, is in debate, and must be resolved by reconciling two conflicting principles. On one hand, as Breyer notes, expatriation is accomplished at the time of the expatriating act, not at the time of a subsequent adjudication. *See United States ex rel. Marks v. Esperdy*, 315 F.2d 673, 676 (2d Cir. 1963), *aff'd by an equally*

divided court 377 U.S. 214 (1964) ("[L]oss of nationality occur[s] immediately upon the commission of expatriating acts . . . ."); 7 Charles Gordon et al., Immigration Law and Procedure § 91.03[1], at 91-16 - 17 (Rev. ed. 2001) ("[C]itizenship status becomes fixed and will be determined under the law in effect at the time the critical events occurred . . . . The same rule generally is followed in determining whether loss of citizenship has occurred. Such a determination is made in light of the circumstances and the laws in effect at the time the critical events occurred, except where the constitutionality of those laws is questioned.") (citation omitted). A given action will constitute expatriation, then, only if the law that was operative at the time of the action afforded it this consequence. As applied in this case, this principle indicates that Breyer's service in the Death's Head Battalion must have been an expatriating event when performed during 1943 and 1944. At that time, of course, the Nationality Act of 1940 was the law regarding issues of expatriation.

On the other hand, the INS contends that the most recent amendments to the INA, ratified in 1988, *see* The Immigration Technical Corrections Act of 1988 ("1988 Act"), Pub.L. No. 100-525, § 9(hh), 102 Stat. 2609, made retroactive the INA's designation of pre-majority foreign military service as expatriating. It allegedly accomplished this by altering an introductory phrase in § 349(a) of the INA, now codified at 8 U.S.C. § 1481(a). *See* Def.'s Memo at 13. That section originally read: "From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization shall lose his nationality by . . . ." In 1988, the language "[f]rom and after the effective date of this Act," was deleted, thereby leaving the section to begin "A person who is a national of the United States whether by birth or naturalization shall lose his nationality by . . . ." The INS asserts that this alteration strongly

indicates that Congress intended for the INA "to describe expatriating acts performed before 1986." Def.'s Memorandum at 13. If so, then the INA governs this court's evaluation of Breyer's service in the Death's Head Battalion during his minority.

Upon a considered analysis of these contentions, I find Breyer's to be more persuasive. The problem with the retroactivity argument advanced by the INS is that a far more compelling showing of congressional intent is necessary if a federal statute is to be afforded retroactive effect. The United States Supreme Court addressed precisely this issue just last term in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), a case exploring a different set of issues regarding our immigration laws. In *St. Cyr* the Court was required to determine whether § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") is properly construed as being retroactively effective. At the outset of its analysis the Court explicated the "special concerns" associated with retroactive statutes. It stated:

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Accordingly, "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result."

St. Cyr, 121 S. Ct. at 2287-88 (quoting *Landgraf v. USI Film Prods*, 511 U.S. 244, 266 (1994) and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

The degree of unambiguity required of a valid congressional pronouncement of retroactivity is extremely high. As stated in *St. Cyr*, "cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *St. Cyr*, 121 S Ct. at 2288. As an example of

such language, the *St. Cyr* Court pointed to a provision of the IIRIRA that was not then at issue. In § 321(b) of the IIRIRA, Congress made its amendment of the definition of the term "aggravated felony" applicable to convictions "entered *before*, on, or after" the date of the section's enactment. *Id.* (emphasis added). The only conceivable significance of the word "before," as used in that section, was to render the section retroactively applicable. By contrast, the lack of such explicit language in § 304(b) led the Court to conclude that "'Congress did not definitively decide the issue of § 304(b)'s retroactive application . . . .'" *Id.* at 2290 (quoting *St. Cyr v. INS*, 229 F.3d 406, 415 (2d Cir. 2000)). Given such congressional indeterminacy, the Court refused to afford retroactive effect to § 304(b).

As applied to the instant case, these principles dictate that 8 U.S.C. § 1481(a) cannot be applied retroactively. Simply stated, there is nothing in the text of § 1481(a) that resembles the unambiguous pronouncement contained within § 321(b) of the IIRIRA. While the Immigration Technical Corrections Act of 1988 removed any affirmative indication that the statute is to be applied prospectively only, it is notable that this language was not replaced with an equally explicit statement of retroactive application. Instead it was simply deleted. Under these circumstances the textual indicia of Congress's intent regarding the retroactivity of § 1481(a) are ambiguous at best, thus bringing this case squarely in line with the facts at issue in *St. Cyr*.

Nor does the legislative history of the 1988 Act provide more compelling evidence that Congress intended this statute to make retroactively applicable the definitions of expatriating acts contained in § 1481(a). It is unquestionable that the post-hoc designation of a given action as "expatriating" would constitute a dramatic substantive revision of our citizenship

laws. Yet uncontradicted statements from members of both houses of Congress indicate that the changes intended to be given effect by this Act were predominately technical. *See, e.g.*, 134 Cong. Rec. H9839-01 (daily ed. Oct. 6, 1988) (statement of Rep. Mazzoli) ("Mr. Speaker, since the Senate passed S. 2479 on June 7, my subcommittee has resisted resolutely appending substantive amendments to this bill. Consequently, the bill before the House today is purely technical."); *Id.* (statement of Rep. Swindall) ("The legislation corrects incorrect citations, misspellings, and other clerical errors found in the act. No substantive changes are included in the bill. Although this is only a technical corrections bill, certain errors have had substantive impact on the implementation of the code. This bill hopefully will clear up any ambiguity caused by drafting errors and prevent future controversy caused by these errors."); 134 Cong. Rec. S7323-01 (daily ed. June 7, 1988) (statement of Sen. Kennedy) ("This package corrects clerical errors, incorrect citations, misspellings, and other similar mistakes in drafting found as we have implemented the several immigration-related bills enacted in the last Congress, as well as some minor corrections to the Immigration Code. . . . I might also mention that while this is only a technical bill, certain drafting errors have at least a minor substantive impact. For example, the Immigration Service temporarily called back some retirees to assist in the legalization program. A drafting error inadvertently placed in jeopardy the retirement annuity of those persons. Given the nonsubstantive nature of this bill, it is my hope that we can dispense with it quickly."). In fact, the change implemented by §9(hh) of the Act was described in the Senate as one intended "to delete obsolete language" 134 Cong. Rec. S7323-01 (daily ed. June 7, 1988).

These repeated statements to the effect that the Act was intended merely to correct clerical and drafting errors provide ample support for the conclusion that Congress failed to

express the requisite clear intent to make the definitions of expatriating acts contained in 8 U.S.C. § 1481(a) retroactively applicable. Indeed, it is far from clear that the 1988 Act was intended to have anything more than an incidental effect on the substance of the law governing immigration and citizenship. Moreover, whatever substantive effect the Act was supposed to have was limited to the restoration of the intended pre-1988 meaning of the INA. Therefore, this is not a case where the requisite clear intent regarding retroactivity may be gleaned from the legislative history of a facially ambiguous statute.

Fortifying this conclusion against a finding of retroactivity is the very purpose underlying the critical scrutiny afforded by courts to purported statements of retroactive effectiveness. As stated in *St. Cyr*, "[r]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." 121 S. Ct. at 2290 (quoting *Landsgraf*, 511 U.S. at 272-73). Here, that rationale is especially critical given the fundamental importance of citizenship. As stated in *Afroyim v. Rusk*,

> Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world–as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry.

387 U.S. 253, 267-68 (1967). The clear intent requirement is also supported by the axiom that "factual doubts in expatriation cases are to be resolved in favor of citizenship." *Bruni v. Dulles*, 235 F.2d 855, 856 (D.C. Cir. 1956); *cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (holding that ambiguities in deportation statutes should be construed in favor of the alien).

Consequently, the lack of a clear congressional intent regarding the temporal reach of the 1988 Act is an especially compelling reason to refrain from considering that statute to be retroactively effective. Indeed, there is no evidence that Congress weighed the "potential unfairness of retroactive application" against the benefits to be derived therefrom at all, much less that it concluded that those benefits outweighed the associated costs.

Because 8 U.S.C. § 1481(a) is not retroactively applicable, and because expatriation transpires with the performance of the expatriating act, the necessary conclusion is that the expatriating effect of Breyer's service in the Death's Head Battalion must be determined as per the 1940 Act. As indicated above, that Act delineated eight distinct expatriating actions that could be undertaken by a national of the United States. Nationality Act of 1940 § 401(a)-(h). Yet the 1940 Act later provided that "[n]o national under eighteen years of age can expatriate himself under subsections (b) to (g) inclusive, of section 401."[6] *Id.* § 403(b). Accordingly, none of the actions undertaken by Breyer prior to his eighteenth birthday can be considered as entailing an expatriating effect. If he did expatriate himself, then, such must have been accomplished by his service or oath following his eighteenth birthday.

While the INS's contention regarding the retroactivity of § 1481(a) is unpersuasive, the government is correct in its second argument, namely that Breyer should not receive the benefit of the pre-1961 presumption that an expatriating act was undertaken

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[6] While this provision excludes subsection (h) from its scope, that subsection, concerning the commission of an act of treason against, or attempting to overthrow by force, the government of the United States, is not at issue in this case. The expatriating acts allegedly committed by Breyer are those specified in subsections (b) and (c) of § 401.

involuntarily.[7] It is certainly true that, prior to 1961, the 1940 Act was interpreted to entail such a presumption. In *Nishikawa v. Dulles*, 356 U.S. 129, 134-35 (1958), the Court stated:

> Because the consequences of denationalization are so drastic petitioner's contention as to burden of proof of voluntariness should be sustained. This Court has said that in a denaturalization case, "instituted . . . for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *Schneiderman v. United States*, 320 U.S. 118 (1943). The same principle applies to expatriation cases, and it calls for placing upon the Government the burden of persuading the trier of fact by clear, convincing and unequivocal evidence that the act showing renunciation of citizenship was voluntarily performed.

Id.

Yet as stated, in the 1961 amendments to the INA, first codified at 8 U.S.C. § 1481(c) and now found at § 1481(b), Congress expressed its disapproval of this aspect of *Nishikawa*. It did so by transforming the requirement that the government prove voluntariness by clear and convincing evidence into a bipartite evidentiary scheme under which (1) the burden remains upon the government to prove, under the less demanding "preponderance of the evidence" standard, that citizenship was lost; and (2) the voluntariness of expatriation is presumed, subject to rebuttal by the purported citizen by a preponderance of the evidence. Under this scheme it is clear that although the government ultimately must carry the burden of demonstrating that Breyer has expatriated himself, this responsibility is to some degree eased by the fact that Breyer must establish the involuntariness of his service in the Death's Head Battalion. The Supreme Court upheld the constitutional validity of this evidentiary standard in

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[7] Breyer argues to the contrary, contending that "in this Circuit, conscription in foreign military service is presumed to be involuntary." Pl.'s Memo. at 9 (citing *Lehmann v. Acheson*, 206 F.2d 592 (3d Cir. 1953).

Terrazas. *See* 444 U.S. at 267-70.

The conclusion that Breyer must prove the involuntariness of his actions pursuant to the INA is not at all affected by the applicability of the 1940 Act to the different question of whether his service during his minority entailed expatriating effect. Indeed, the fact that the 1940 Act controls that decision does not dictate that the evidentiary standards to be employed in a present day determination of the voluntariness of his service are also to be derived from that Act or the jurisprudence interpreting it. As stated, it is necessary to look to the 1940 Act to determine whether Breyer's actions were expatriating because expatriation occurs at the time of the expatriating act. This rationale, however, is inapposite to the question of what standard will govern the presentation of evidence regarding the voluntary character of that act.

In sum, Breyer's first contention is correct insofar as it goes; his affirmation of loyalty to the Third Reich and his service thereof during his minority cannot, as a matter of law, constitute expatriating events. Yet it is undisputable that, if undertaken voluntarily, his service in the Death's Head Battalion or oaths after his eighteenth birthday would serve as such an event. The burden rests upon Breyer to demonstrate the involuntariness of his actions. *See Breyer*, 214 F.3d at 431.

It is therefore unsurprising that Breyer's second argument as to the involuntary character of his service is that, once inducted into the Third Reich, he was left without any reasonable way of relinquishing his Nazi association. *Pet.'s Memorandum* at 6. Breyer notes that he was conscripted into the Death's Head Battalion as a minor, and that the two appeals made on his behalf for his release from service were unsuccessful. These considerations, he suggests, indicate the involuntary nature of his service. He also cites the Supreme Court's

holding in *Mandoli v. Acheson* for the proposition that "'[t]he choice of taking the oath or violating the law was for a soldier in the army of Fascist Italy no choice at all.'" 344 U.S. 133, 135 (1952) (quoting 41 Op.Atty.Gen., Op.No.16). Service in the German army under Hitler, he asserts, was equally non-discretionary.

The INS responds by pointing to the fact that Breyer returned from both of his "leaves" from Auschwitz to resume his service as evidence of the voluntariness of his actions. Government's Response to Plaintiff's Motion for Summary Judgment at 7. It also notes that Breyer received promotions for his performance as a member of the Death's Head Battalion, *id.* at 8, and that he "received benefits for his parents through service in the SS Death's Head guard battalions and managed to increase these benefits while on his second leave from Auschwitz." *Id.* at 7.

Most cases addressing the issue of conscription, as opposed to enlistment, into the military of a foreign country have held that such does not constitute a voluntary action for purposes of expatriation analysis. *See, e.g.*, *Nishikawa*, 356 U.S. at 136-37 (holding that petitioner's conscription into Japanese army was involuntary); *Augello v. Dulles*, 220 F.2d 344, 346-47 (2d Cir. 1955) (holding that the "fact of the plaintiff's conscription into the Italian army was sufficient proof of duress to preclude a finding that his consequent taking of the oath was voluntary"). *Cf. United States v. Ciurinskas*, 148 F.3d 729, 734 (7th Cir. 1998) (holding that an individual who had served in the 2nd Schutzmannschaft Battalion of the German Order Police during World War II had done so voluntarily where there was no evidence that he had been conscripted, and where members of his battalion were permanently released from service upon a written request); *United States v. Stelmokas*, 100 F.3d 302, 313 (3d Cir. 1996) (same).

Yet these precedents do not control the voluntariness analysis in Breyer's case because the nature of his service is a question not of law but of fact. As Justice Black indicated in his concurring opinion in *Nishikawa*, "whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights." 356 U.S. at 139 (Black, J., concurring), *cited in Terrazas*, 444 U.S. at 266 ("[T]he question whether citizenship has been voluntarily relinquished is to be determined on the facts of each case . . . ."). This factual issue is both genuine and essentially material, and its existence precludes a grant of summary judgment in this case for Breyer. At trial, as indicated, the onus will lie with Breyer to surmount the presumption of voluntariness that is codified at 8 U.S.C. § 1481(b).[8] Assuming Breyer's service is found to be voluntary, however, this burden

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[8] The INS relies on the recent decision of the Supreme Court in *Nguyen v. INS*, 121 S. Ct. 2053 (2001) as support for the argument that even if his expatriating acts are found to have been performed involuntarily, this court lacks the power to declare Breyer a citizen. Def.'s Memo. at 19. ("Breyer may not be naturalized in a manner not specifically authorized by Congress.").

The instant matter, however, is distinguishable from *Nguyen*. Nguyen was not a citizen by birth, and the constitutionality of the statute which prevented him from being considered as such, 8 U.S.C. § 1409(a), was upheld. Accordingly, the only possible way that Nguyen could have become a citizen was through naturalization. The Court specifically held, albeit in dicta, that "citizenship under § 1409(a) is retroactive to the date of birth, but it is a naturalization under [8 U.S.C. §] 1421(d) nevertheless. The conditions specified by section [] 1409(a) for conferral of citizenship, as a matter of definition, must take place after the child is born, in some instances taking as long as 18 years. Section 1409(a), then, is subject to the limitation imposed by § 1421(d)." Under those circumstances, a declaration that Nguyen is in fact an American national would have resulted in a "conferral of citizenship on terms other than those specified by Congress." 121 S. Ct. at 2065.

Yet here, the statute that unconstitutionally denied Breyer citizenship at birth did not delineate conditions necessarily fulfilled subsequent to his birth. *See* INTCA§ 101(c)(2). As such, the reasoning that led the *Nguyen* Court to conclude that naturalization was the sole possible means of conferring citizenship in that case does not appear to be applicable to the facts presently at bar. Moreover, and more importantly, the only possible meaning of the Third Circuit's direction to engage in a voluntariness determination for purposes of expatriation analysis is that Breyer is to be considered a citizen. Indeed, the question of expatriation is

will be reversed with regard to the secondary question of whether such was performed with the intent to relinquish United States citizenship. *See Terrazas*, 444 U.S. at 268 ("That matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence.").

Based on the foregoing, Breyer's motion for summary judgment will be denied.[9]

An appropriate order follows.

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relevant only where the person who committed the expatriating act is a citizen in the first place. Put differently, the matter before this court does not concern the conferral of citizenship upon Breyer. Instead, as per the Third Circuit's remand, I must determine whether Breyer voluntarily relinquished the citizenship that was bestowed upon him at birth. This is a question to which *Nguyen* does not speak.

To the extent that the Third Circuit's direction to this court is in conflict with *Nguyen*, as the INS suggests, *see* Def.'s Memo at 18, that is an error properly rectified by the Court of Appeals.

[9] As indicated at the outset of this opinion, Breyer does make a third, legal argument as to the involuntariness of his service. He contends that "[a] citizen who does not and cannot know that he enjoys citizenship in the United States is incapable of forming the requisite intent to expatriate." Pl.'s Motion at 11 (citing *Rogers v. Patokoski*, 271 F.2d 858 (9th Cir. 1959).

Although there is some support for this argument, *see United States v. Schiffer*, 831 F. Supp. 1166, 1190 (E.D. Pa. 1993), it can be rejected *ab initio* because it was rejected by the Third Circuit, which stated:

> We conclude that a voluntary oath of allegiance to a nation at war with the United States and to an organization of that warring nation that is committed to policies incompatible with the principles of American democracy and the rights of citizens protected by the American constitution–an organization such as the Death's Head Battalion–is an unequivocal renunciation of American citizenship whether or not the putative citizen is then aware that he has a right to American citizenship.

Breyer, 214 F.3d at 431. Breyer seems to concede the court of appeals's rejection of his contention, Pl.'s Memorandum at 11, but he argues that the Third Circuit's "dictum" is contrary to the specific intent requirement mandated by the Supreme Court in *Terrazas*. *Id.* To the extent that a tension exists between the opinion of the Third Circuit in this case and *Terrazas*, however, the reconciliation of such is a task for our Court of Appeals. I am bound by the statement of that court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHANN BREYER, Plaintiff,	:	
v.	:	CIVIL ACTION
DORIS MEISSNER, United States Immigration and Naturalization Service Defendant.	:	NO. 97-6515

Order

And now, this ____ day of November, 2001, upon consideration of the plaintiff's motion for summary judgment (Doc. # 48), the plaintiff's memorandum of law in support thereof, the defendant's response thereto (Doc. # 53), the exhibits attached thereto, defendant's memorandum of law in support thereof, the exhibits in support thereof (Doc. # 55) and the plaintiff's reply thereto (Doc. # 54) it is hereby ORDERED that the plaintiff's motion is DENIED.

_____

William H. Yohn, Jr., Judge